



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

File Number: B52/2022  
File Title: BDO v. The Queen  
Registry: Brisbane  
Document filed: Form 27F - Appellant's Outline of oral argument  
Filing party: Appellant  
Date filed: 20 Apr 2023

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IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY

BETWEEN:

**BDO**  
Appellant  
and  
**THE QUEEN**  
Respondent

**APPELLANT'S OUTLINE OF ORAL SUBMISSIONS**

**Part I:**

I certify that this outline is in a form suitable for publication on the internet.

**Part II:**

**GENERAL**

- 1. The 9-year time frame for the charges and its implications for the trial.**

**GROUND 1**

- 2. The nature of the presumption against capacity for children.**
- 3. The principles in *RP v The Queen*.**
- 4. The directions given to the jury and the Court of Appeal's approach.**
- 5. The principles in *RP v The Queen* should apply to s 29 *Criminal Code* (Qld).**
  - The approach to construing a *Code*.
  - Section 29 is appropriately construed by reference to the development of the common law of *doli incapax*.
- 6. The evidence at trial was incapable of rebutting the presumption against capacity.**
  - The evidence of the appellant's conduct was equivocal as to capacity for moral reasoning.

- b. There was an almost complete absence of evidence of the Appellant's intellectual and moral development and that which existed was, at best for the Crown, neutral.

**7. The proviso cannot apply.**

- a. The errors prevented the jury from assessing the question of capacity as the law required them to do.
- b. In any event, on a review of the record, the evidence cannot prove capacity beyond reasonable doubt in relation to any or all counts.

**8. The remedy on Ground 1.**

- a. The Crown's charging choice made the s 29 presumption relevant to every charge and it should not now be permitted to proceed on appeal as if the charges had been differently framed.
- b. In any event, the evidence of timing was vague and contradictory.
- c. In the absence of sufficient evidence to rebut the s 29 presumption, acquittals should now be entered.

**GROUND 2:**

**9. The dispute as to whether the Court was applying the proviso or determining the precedent miscarriage question.**

**10. Either way, the failure to direct on an element offence that was "live" and was not properly conceded gave rise to a miscarriage of justice and a substantial miscarriage of justice.**

- a. Unless an element of the offence is positively disavowed *and* not open on the evidence, it should be treated as "live".
- b. This flows from the basal obligation on the Crown to prove each element of the offence.

**11. Consent was live on the defence case and on the evidence.**


- a. The element of consent was left to the jury.
- b. The Crown closed on consent – including on the mistaken age restriction.

- c. The defence closed on consent as an alternative case theory.
- d. The trial judge directed the jury on the basis that consent was a live issue.

**12. The proviso should not be applied.**

- a. Having chosen dates for the indictment that pre-date the legislative change it is not now open to the Crown to proceed as if it had not done so.
- b. No meaningful attempt at a *Weiss* analysis has been undertaken by the Crown and this is not a case suitable to assessment on the record.

Dated: 20 April 2023



Saul Holt KC  
Zoe Brereton